No. 14,708

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY,
a Corporation,
Appellant,

vs.

OSCAR F. ERICKSON,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

I. STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURT'S JURISDICTION.

This is an appeal from a judgment entered in the United States District Court, Northern District of California, Southern Division, on the 7th day of January, 1955, in favor of the appellee Erickson after trial by the Court sitting without a jury of an action to recover proceeds under an automobile insurance policy.

The District Court had jurisdiction of the cause under the provisions of Title 28 U.S.C.A., Sec. 1332-2.

The United States Court of Appeals for the Ninth Circuit has jurisdiction upon appeal to review the

judgment of the District Court below under the provisions of Title 28 U.S.C.A., Sec. 1291.

II. STATEMENT OF THE CASE.

The printed record on appeal consists of the pleadings, and formal documents (pages 3-45); the opening statements of counsel (pages 46-56); stipulations, reception of documents into evidence, and testimony of all witnesses (pages 57-169); argument of counsel. (pages 170-182.)

Appellant Allstate Insurance Company is an insurance company organized under the laws of the State of Illinois and authorized to conduct insurance business in the State of California.

On December 17, 1952, at 6:05 P.M., appellee applied to appellant for a policy of automobile insurance, signing an application for the issuance of the policy. (Plaintiff's Exhibit No. 3. The original signature appears on Defendant's Exhibit No. "D".) This application contained a question: "Has any insurer ever cancelled any automobile insurance issued or refused any automobile insurance to the applicant or to any of his household? ☐ Yes ☒ No. If 'Yes', explain fully on reverse."

The appellee answered this question "No", signing his name to the application which stated:

"BINDER

"Subject to the conditions on the reverse side, the Company hereby binds the insurance applied for, to become effective

as of 6:05 ~~AM~~ PM 12 (Month) 17, (Day) 1952. (Year)

Application signed: 6:05 ~~AM~~ PM 12 (Month) 17, (Day) 1952. (Year)

"I hereby declare the facts stated herein to be true and request the Company to issue the insurance, and any renewals thereof, in reliance thereon.

Oscar F. Erickson,
(Applicant signs here)"

The pertinent portion of the reverse side of the application reads as follows:

"5. Any insurance bound hereunder shall otherwise be subject in all respects to the terms and conditions of the regular policy form of the Company at present in use and to the statements in this application. If a policy is issued, it shall bear the effective date as provided on the face hereof."

Coverage was extended immediately, i.e., the appellant immediately bound itself to give full insurance protection giving a signed copy of the application to appellee stating insurance was in force. In due course a policy was issued (Plaintiff's Exhibit No. 1) which contained the following terms:

"The Allstate Insurance Company, a stock company, Home Office Chicago, in reliance upon the declarations on the supplement page and subject to the limits of liability exclusions, conditions and other terms of this policy and for payment of the premium, Allstate agrees with the named insured * * *

Supplement Page.

7. During the past two years with respect to the named insured or to any member of his household no insurer has cancelled or refused any automobile insurance. * * *

'The Following Conditions Apply to All Coverages:

'(1) Effective policy acceptance:

'By acceptance of this policy the named insured agrees that the declarations on the supplement page are his agreements and representations and that this policy embodies all agreements relating to this insurance existing between himself and Allstate or any of its agents.' "

This insurance coverage was issued by appellant because "defendant did, in fact, materially rely on the representation made by the plaintiff in the policy and on the negative answer of the plaintiff to the question asked of him at the time of his application for the said insurance policy." (Opinion Tr. p. 16, Findings of Fact 9, p. 38.) This binder coverage and the policy subsequently issued could not and would not have been so issued as was done in this case if appellee had answered the question concerning previous cancellation "Yes". (Tr. p. 136, Tr. p. 146.)

Unknown to appellant, the appellee admittedly had received a letter from his previous insurance carrier prior to his application to Allstate Insurance Company on December 17, 1952, which read as follows (Plaintiff's Exhibit No. 2):

"December 15, 1952

Mr. O. F. Erickson and
Mrs. Birdella A. Erickson

P. O. Box 812
Booneville, California.

Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy #528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-dr. Sed., motor number V19458.

Policy #528848-B04-05 is being cancelled effective 12:01 A.M. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

Our draft in the amount of $11.35 is being forwarded to our representative for disposition.

This represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,
G. M. Cowden /s/
Underwriting Superintendent"

Appellee knew of his previous bad accident record with the State Farm Mutual Insurance Company and had knowledge that the cancellation was because of the loss record. (Tr. pp. 80, 81, 88, 89.)

Subsequently, in February of 1953, appellee's car was in an accident. In the course of investigation of it and claims under the policy, appellant learned of the State Farm Mutual Insurance Company cancellation (Tr. p. 162) and reserved its rights by letter to appellee. (Plaintiff's Exhibit No. 8.) Subsequently, appellant disclaimed coverage. (Tr. p. 162.)

Appellant brought a declaratory relief action in Sonoma County, California, where venue existed because of the issuance of the policy at that place. Appellee had the declaratory relief action dismissed under the discretionary power of that Court in order to file this action as plaintiff in the Federal Court. (Tr. pp. 178-179.)

After trial of this action judgment was rendered for appellee, the Court stating in its opinion (Tr. p. 18), that appellee had not made a false representation as affirmatively alleged in Paragraph II of the special defense of appellant set forth in the answer to complaint. (Tr. p. 14.)

III. QUESTIONS INVOLVED.

The opinion of the trial Court and the findings of fact and conclusions of law based thereon pose the direct question as to whether or not there was a cancellation of insurance issued to appellee within two (2) years preceding December 17, 1952 when he answered the question in the application concerning cancellation "No".

There is a further question as to whether, under the provisions of the Insurance Code of the State of California, there was a material misrepresentation and breach of warranty on the part of appellee in failing to disclose his cancellation and recent insurance history at the time he made the application of December 17, 1952.

IV. SPECIFICATION OF ERRORS.

1. The trial Court erred in not holding that a cancellation of the State Farm Mutual Insurance Company policy had occurred on receipt by appellee of the letter of December 15, 1952 from State Farm Mutual Insurance Company.

2. The trial Court erred in construing the State Farm Mutual Insurance Company letter of December 15, 1952 to be a "threat to cancel" rather than a present cancellation.

3. The trial Court was in error in stating that appellee truthfully answered when he applied to Allstate Insurance Company that he did not have an insurance policy cancelled or refused.

4. The trial Court erred in not following the rule of law expressed in *American Glove Company v. Pennsylvania Insurance Company,* 15 Cal. App. 77, and in *Allstate Insurance Company v. Moldenhauer,* 193 Fed. 2d 663.

V. SUMMARY OF ARGUMENT.

1. The letter of December 15, 1952 from State Farm Insurance Company constituted a cancellation.

2. The rule of decision in California demands sensible construction of insurance contracts and squarely rejects the trend to distort language in order to avoid the plain import of the words used.

3. There was no ambiguity in the letter of December 15, 1952 and it was a present unequivocal cancellation.

4. Uniformity of decision requires that the rule of *Allstate Insurance Company v. Moldenhauer* on identical facts be observed.

5. Concealment of a cancellation was a misrepresentation constituting a breach of warranty causing a policy issued in reliance on misrepresentation to be void from inception and entitling the insurer to rescind.

VI. ARGUMENT.

The trial Court concluded and found that the December 15, 1952 letter of the State Farm Mutual Insurance Company to appellee did not constitute cancellation of his existing insurance because the effective date of cancellation was stated in it to be December 27, 1952 which was a time subsequent to the application to appellant on December 17, 1952 for a policy.

It is submitted that this letter is an unequivocal statement of cancellation so entitled and plainly intended:

"December 15, 1952

Mr. O. F. Erickson and
Mrs. Birdella A. Erickson

P. O. Box 812
Booneville, California

Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy #528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-dr. Sed., motor number V19458.

Policy #528848-B04-05 is being cancelled effective 12:01 A.M. Standard Time on the 27th day of December, 1952, and no further protection will be afforded after that date.

Our draft in the amount of $11.35 is being forwarded to our representative for disposition. This represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,
G. M. Cowden /s/
Underwriting Superintendent."

It is submitted that the trial Court gave an erroneous interpretation of plain language and an interpretation contrary to established principles of law.

Under the rule of *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, the law of the State of California should be applied in this controversy because the contract of insurance was made in this state.

The effect of a letter such as that sent by State Farm Mutual Insurance Company to appellee on

December 15, 1952 has been construed in this state in the case of *American Glove Company v. Pennsylvania Insurance Company,* 15 Cal. App. 77.

In the American Glove case the Pennsylvania Insurance Company wrote as follows:

> "San Francisco, April 9th, 1906.
>
> Register.
>
> American Glove Co., 3648 19th Street, S.F.
> Gentlemen: — We desire to terminate our liability under Policy No. 170062 issued in your favor for $1500, covering on stock of gloves and machinery. The policy will be canceled on our books on the 14th inst., five days from date. Kindly return the policy to this office, together with the earned premium of $5.15 on that date. The plant being shut down permanently makes it undesirable. Bill enclosed herewith.
>
> Yours very truly,
> R. W. Osborn,
> Manager."
>
> 1 enclo.

The District Court of Appeal held that this was not an expression of intention to cancel at a future time but a present resort to the right to cancel:

Pages 80-81:

> "Plaintiff in the same connection argues that the notice of April 9th was not a notice of cancellation, but merely of an intention to cancel, and therefore insufficient. But the notice expressed defendant's present 'desire to terminate liability.' The policy required 'five days' notice of such cancellation,' and for this reason the form of expression was adopted that the policy 'will be

canceled on our books on the 14th inst., five days from date.' Moreover, the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company desiring then to cancel the policy and to terminate its risk, thereby gave the insured the five days' notice prescribed by the policy, at the expiration of which the cancellation would become effective."

Pages 81-82:

"Here five days' notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice.

"In Davidson v. German Ins. Co., 74 N. J. L. 487, (65 Atl. 996, 13 L. R. A., N. S., 884), the converse of the question raised by plaintiff was presented. There, under a cancellation clause similar to the one here involved, the trial court had instructed the jury that a notice that 'your policy is canceled' was no notice at all, the required form being, 'Your policy will be canceled in five days.' In holding this instruction to be erroneous the court of errors and appeals said: 'The notice is not required to be in writing. It may be verbal or oral. No particular form of notice is prescribed. It is only necessary that the company positively, distinctly and unequivocally indicate to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the

time when this intention is made known to the insured. And it does not matter whether this information is conveyed by the use of the words, 'Your policy will be canceled in five days,' or 'Your policy is already canceled.'

"Even where the policy permits immediate cancellation upon notice, an unequivocal notice that the company will, on and after a certain future date, consider the policy canceled is held effective. The assured upon whom such a notice was served would be left in no doubt of the purposes of the company. He could not fail to understand that it was notice of the cancellation of the policy, to take effect on the day named in the notice. (Lattan v. Royal Ins. Co., 45 N. Y. 453, 458.)

"It is finally contended by plaintiff that some affirmative act of cancellation by the company, in addition to the notice given by it to the insured, was necessary to terminate its liability, and that the 'act of cancellation' mentioned in the letter of April 13th was premature, five days not having elapsed since either the mailing or the receipt of the prior notice, and that consequently the risk was not terminated before the occurrence of the loss. But no affirmative act of cancellation beyond the giving of the notice was necessary."

The Court held further that even a mistake in the number of days in which coverage would be extended following cancellation notice did not vitiate the plain tenor of the letter manifesting a present cancellation.

The American Glove case has been followed in numerous decisions of many jurisdictions to this day

and is a most frequently cited case in every authority on the subject of cancellation of insurance policies.

35 A. L. R. 900;
Appleman on Insurance, Vol. 6, Sec. 4194;
Black on Recision of Contract and Written Instruments, Vol. 2, Sec. 481;
Joyce on Insurance, 2d Edition, Secs. 1670, 1670-A, 45 C. J. S. page 88;
32 C. J. 1249, 1250;
14 Cal. Jur. 438.

The proper interpretation of the State Farm Mutual Insurance Company letter of December 15, 1952 to appellee is that there was a cancellation made by the company, completed and expressed in it for there was no statement of an intention to act on any contingency at any future date and there was no requirement of any further act on its part to make the cancellation effective.

As was said in *Knutzen v. Truck Insurance Exchange,* 90 Pac. 2d 282 at 285, 199 Wash. 1:

> "The essence of a notice when sufficient in form and content is its objective consequences upon the one who receives it, not the subjective attitude of one who gives it."

This common sense statement is borne out by the fact that appellee was well aware that his insurance was cancelled by the State Farm Mutual Insurance Company on receipt of the letter because he immediately applied to appellant for insurance within a day of the receipt of the letter or on the day he received it.

Appellee had no reason to seek insurance coverage from appellant if he did not know that his previous policy had been cancelled by State Farm Mutual Insurance Company.

The trial Court, in its opinion (Tr. pp. 17-18), felt that the question asked of appellee concerning previous cancellation was ambiguous. Under the rule expressed in the *Knutzen* case, supra, and evidence of the objective conduct of appellee on receipt of the letter in seeking a new policy, it must be clear that there was no ambiguity insofar as appellee was concerned.

Section 1644 of the Civil Code of the State of California compels this conclusion:

> "Section 1644. Words to Be Understood in Usual Sense. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

See also *Massachusetts Mutual Life Insurance Company v. Pistolesi,* 160 Fed. 2d 668 at 669.

In the case of *Emery v. Pacific Employers Insurance Company,* 8 Cal. 2d, the Supreme Court of the State of California construed a similar cancellation, stating at page 670:

> "If the insurer clearly and unequivocally indicates its unwillingness to continue upon the risk there is a refusal by the company within the mean-

> ing of the warranty provision, notwithstanding the insurer's request that the insured return the policy for cancellation with the request he complies." (Citation.)

The trial Court in the opinion (Tr. p. 18) indicates that it was the effective date of the termination of coverage on December 27, 1952 that constituted a "cancellation". In other words, the trial Court construed the State Farm Mutual Insurance Company letter of December 15, 1952 to be in effect a threat to cancel.

That the State Farm Mutual Insurance Company letter of December 15, 1952 did not constitute a threat to cancel on December 27, 1952 but was a present cancellation is, therefore, clearly demonstrated. The distinction between a threat to cancel at a future time as opposed to a present cancellation is well demonstrated in *Wisconsin Mutual Gas Company v. Employers Liability Company, et al.,* 58 N.W. 2d 424, 263 Wisc. 633. There a directed verdict was given against Liberty Mutual Insurance Company which had denied coverage to an insured. Prior to the accident Liberty Mutual Insurance Company had written its insured as follows:

> "In accordance with the provisions of the policy contract, we hereby cancel Policy No. 4-4930-NL, said cancellation to be effective as of 12:01 A.M. Standard Time, May 10, 1949."

Included with the notice was a separate card which reads:

"The protection afforded by your insurance will terminate on the cancellation date specified in the attached letter. If your check for the entire premium is received prior to the date of cancellation we shall gladly reinstate your coverage and continue your insurance protection without interruption." (58 N. W. 2d at page 427.)

On appeal by Liberty Mutual Insurance Company the Court reversed the judgment, stating that this was not an ambiguous or equivocal cancellation and the Court reasoned (page 428):

"In the case at bar the notice sent by the company clearly expressed an election to cancel the policy. It set forth a specific time when the cancellation would be effective. There is nothing in any part of the notice or the accompanying card that may fairly be said to amount to a retraction or modification of the cancellation. It was there said: 'The protection afforded by your insurance will terminate on the cancellation date specified in the attached letter.' Such notice was clearly an effective notice to terminate the policy under the decision of the Washington Supreme Court in Trinity Universal Ins. Co. v. Willrich, 124 Pac. 2d 950, and the notice in the instant case is clearly distinguishable from those in the cases relied upon by the trial judge and urged in argument here.

In Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wisc. 226, 70 N. W. 84, 88, 37 L. R. A. 131, this Court stated: 'There must be an actual notice of cancellation . . . not . . . a notice that the policy will be cancelled.' The foregoing quotation clearly states the distinction between the two lines of cases holding notices of cancellation to be

effective or not effective. If the notice is to be construed as a threat to cancel (if the premium is not paid), then it is not effective; but if it states absolutely that the policy is cancelled (as did the notice in the instant case), then it is effective and the wording of the enclosed post card did not have the effect of making the notice of cancellation a mere threat.

The insured and his mortgagee were thereby notified that only by paying the entire premium would the insured be given further protection. In a cancellation, 'It is only necessary that the company positively, distinctly, and unequivocally indicated to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when this intention is made known to the insured.' " (Citing among other authorities, the *American Glove* case, supra.)

To the same effect the well-reasoned case of *Ralston v. Royal Insurance Company,* 140 Pac. 552, 79 Wash. 557, confirms the interpretation of the letter of the State Farm Mutual Insurance Company of December 15, 1952 to have constituted a cancellation. In this case the insurance company wrote as follows:

"Notice of Cancellation for Non-payment of Premium. Seattle, Wash. February 4, 1913. You are hereby notified that payment has not been made at this office of the premium of $18.88 under Policy No. 705877 . . . Demand is therefore made on you for said premium and unless the same is paid on or before 12 o'clock noon of the 9th day of February, 1913 . . . said policy . . . will stand cancelled for non-payment of premium,

without further notice and all liability thereunder immediately cease and determine after said hour and date."

The property was destroyed on February 13, 1913.

In 140 Pac. 553, it further states:

"It is next argued that the notice served did not purport to be a present cancellation, but indicated only an intention to cancel at a future time, conditioned upon the non-payment of the premium. Many authorities are cited sustaining the rule that a notice which only shows an intention to cancel at a future time, and upon non-compliance with certain conditions is not sufficient. A review of these authorities would render little, if any aid, as each must depend to a large extent upon the language of the cancellation notice. In the present case the notice is more than a mere expression of an intention to cancel at a future date, it is an unequivocal declaration that if the premium is not paid as on or before 12 o'clock upon the day named, then the policy 'will stand cancelled for the non-payment of the premium without further notice.' Language could hardly make it plainer that it was the intention, if the premium were not paid as indicated, that then the policy was cancelled and this without further notice."

See Appleman on Insurance, Vol. 6, Sec. 4185.

That the State Farm Mutual Insurance Company letter of December 15, 1952 constituted a cancellation has heretofore been determined by the Circuit Court of Appeals, Seventh Circuit, in the case of *Allstate Insurance Company v. Moldenhauer,* 193 Fed. 2d 663.

On March 31, 1947, State Farm Mutual Insurance Company wrote Mr. Moldenhauer as follows: (For purposes of comparison, we set forth below the letter addressed to Mr. Moldenhauer and the letter addressed to appellee):

"December 15, 1952

Mr. O. F. Erickson and
Mrs. Birdella A. Erickson
P. O. Box 812
Booneville, California

Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy
#528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-Dr. Sed., motor number V19458.

Policy #528848-B04-05 is being cancelled effective 12:01 A.M. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

Our draft in the amount of $11.35 is being forwarded to our representative for disposition. This represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,

G. M. Cowden /s/
Underwriting Superintendent"

(Tr. p. 23)

"Dear Mr. Moldenhauer:

It is our desire to be relieved of liability for insurance on the above numbered policy.

Policy #14791-NS-49 is being cancelled effective 12:01 A.M., Standard Time, April 6, 1947 and no further protection will be provided on your 1936 DeSoto four door sedan after that date.

The $11.99 returnable from this cancellation is being sent to your agent for his disposition.

We regret that we are unable to be of service to you.

Very truly yours,

Underwriting Department"

On April 4, 1947, Mr. Moldenhauer went to Allstate Insurance Company for insurance after receiving this letter of March 31, 1947. He knew that his policy had been cancelled with coverage ending on April 6, 1947.

Mr. Moldenhauer's conduct was as follows (Tr. pp. 23, 24, 25):

"Q. Now, on April 4, 1947, you went to the Allstate Insurance Company for insurance, did you not?

A. The 4th, yea.

Q. And at that time you knew that your policy had been cancelled effective April 6, 1947?

A. Yeah.

Q. And you went to the Allstate Insurance Company because you had received this letter from the State Farm Insurance Company?

The Court. What is the date of the State Farm letter?

Mr. Kluwin. The letter of March 31, 1947, which is Allstate's Exhibit 2.

A. What was that?

The Court. You may answer the question.

(Whereupon the reporter read the pending question.)

A. I had received a letter that I would be cancelled the 6th.

Q. (by Mr. Kluwin). And it was your desire to get new insurance to go into effect on April 6th; is that corect?

A. That is what I wanted, yeah.

Q. So that in response to that letter you went to the Allstate to try to get insurance?

A. I had figured on insuring with them before, but now I was compelled to get insurance. I

didn't know of any other way of getting insurance, so I went there and I says, 'I'll be out of insurance April the 6th.'

Q. If you hadn't received this letter from the State Farm Mutual, refered to as Exhibit 2, when would your insurance have expired; do you know?

A. That I don't know for sure.

Q. Some months later?

A. I don't know for sure.

Q. But in response to this letter you then went to the Allstate's office in the Sears, Roebuck store?

A. That is why I went down there, yeah.''

Mr. Moldenhauer, like Mr. Erickson in the instant case, falsely stated that his policy had not been cancelled, when in truth and in fact it had been, and he had received the cancellation letter.

Mr. Moldenhauer continued (Tr. pp. 25 and 26):

''Q. (by Mr. Kluwin). Now, Mr. Moldenhauer, before you took out this policy with the Allstate Insurance Company you were insured by the State Farm, were you not?

A. I was what?

Q. You were insured with the State Farm Insurance Company?

A. State Farm Mutual.

Mr. Barly. Excuse me John; he doesn't hear very well. Will you get fairly close to him?

Mr. Kluwin. If I may stand here, if the court please.

The Court. I think if you were closer, over there.

Q. (by Mr. Kluwin). Now, Mr. Moldenhauer, do you have the policy that was issued by the

State Farm Insurance Companies that was in effect just before you took out insurance of the Allstate?

A. I haven't got it now any more.

Q. As far as you know you destroyed that policy; is that correct?

A. Yeah.

Q. In any event the policy that you had with them was cancelled, was it not?

A. Not at the day I insured with Allstate.

Mr. Kluwin. I move that that answer be stricken as not responsive.

The Court. Well, what is 'cancellation'? Was there a failure of renewal in this case or was there an outright cancellation?

Mr. Kluwin. There may be an issue here but I don't think there is any dispute about the fact that the policy was cancelled. Isn't that true, Mr. Barly?

Mr. Barly. I have no proof of it. We can't find any letter that the company had written to him.

Mr. Kluwin. May I ask this question, then, and renew the objection later, if the court please:

Q. Did you ever receive a letter from the State Farm Insurance Companies advising you that they were cancelling the policy?

A. They said they would cancel it the 6th.

Q. You received such a letter?

A. Yeah."

(Tr. pp. 27 and 28):

"Q. And did you see a man by the name of Mr. Miekle there?

A. Yeah.

Q. And at that time did he take an application from you?

A. Yeah.

Q. And did he ask you certain questions?

A. The question was, have you been cancelled?

Q. No. Did he ask you certain questions?

A. Well, some questions, sure.

Q. And you made certain answers?

A. Yeah.

Q. And was one of these—in one of these questions he asked you whether you had ever had any insurance cancelled, did he not?

A. I said not as far as yet; that's my words.

Q. Did you tell him that you had received the letter from the State Farm Mutual?

A. He didn't inquire and I didn't answer him.

Q. I say, did you tell him?

A. No.

Q. You didn't tell him that you received a letter that your policy was being cancelled effective April 6th, did you?

A. No.

Q. And at that time you signed the application after it had been filled out; is that right?

A. Yeah.

Q. I show you what has been marked here as Allstate's Exhibit No. 4, and ask you if at the lower left-hand corner your signature, 'Max W. Moldenhauer', appears?

A. If what?

Q. If that is your signature.

A. Yeah.

Q. And that is the application that you signed?

A. Yeah.''

Compare appellee Erickson's conduct under a similar situation (Tr. pp. 80-81):

"Q. (by Mr. Walcom). You had had about eight losses from 1948 to 1952, had you not, collision losses, to your car?

A. Not that many.

Q. You had several, in any event, did you not?

A. Well, personally I never had any, but I am the father, so I will take the blame.

Q. Let us take the last one immediately prior to the cancellation letter, that was when an intoxicated person was driving your car, isn't that true?

A. That's right.

Q. And then came that letter advising you they were no longer going to carry you, isn't that true?

A. That is right.

Q. And that letter is dated December 15 of 1952?

A. Yes.

Q. You received that the following day, Mr. Erickson?

A. Will you repeat that question?

Q. Could you tell us on what day you received that letter of State Farm advising you that they were going to cancel you? On what date did you receive it?

A. I think on the 15th or 17th, or in between that.

Q. In any event, immediately upon the receipt of that letter, you then went down to Santa Rosa to Allstate Insurance Company?

A. That is correct.

Q. Yes. And it is true, is it not, that you were asked first of all whether or not any insurance

company had cancelled you within two years preceding your application and/or whether any insurance company had refused you coverage; you were asked that question?

A. That's right.

Q. And at that time you said 'No', didn't you?

A. That's right.''

In the *Moldenhauer* case the trial Court rendered judgment for the plaintiff Allstate Insurance Company. The findings of fact and conclusions of law were as follows (Tr. pp. 29-30):

"6. That prior to the issuance of said policy of insurance the said Max W. Moldenhauer executed an application for insurance in which he declared that no insurer had ever cancelled any automobile insurance which it had issued to him.

7. That Allstate Insurance Company issued Policy No. M002734 based upon the express warranty made by the said Max W. Moldenhauer, which express warranty read as follows: 'Has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household, to which question the said Max W. Moldenhauer answered "No".'

8. That State Farm Mutual Insurance Company of Bloomington, Illinois, previous insurer of the said Max W. Moldenhauer, notified the said Max W. Moldenhauer on April 6, 1947, that it was cancelling his insurance, and that one, Mrs. Lehman, wife of the agent for State Farm Mutual Insurance Company, informed the said Max

W. Moldenhauer that said policy of insurance was being cancelled because of the number of small accidents in which the said Max W. Moldenhauer had been involved."

The conclusions of law related in part as follows (Tr., p. 46):

"1. That the policy of automobile liability insurance No. M002734 issued April 6, 1947, by Allstate Insurance Company to Max W. Moldenhauer, and the subsequent renewal policy issued April 6, 1948, are null and void from the date of their original issuance because of the failure on the part of said Max W. Moldenhauer to disclose material facts, which failure to so disclose increased the risk.

Judgment followed."

In an appeal which followed, the United States Court of Appeals affirmed the judgment, stating in part at page 664, as follows (emphasis ours):

"The case was tried by the court without a jury. The trial judge found that prior to the issuance of the policy of insurance to the issuance of the policy of insurance Moldenhauer had executed an application for insurance in which he declared that *no insurer had ever cancelled any automobile insurance which it had issued to him,* and that plaintiff had issued the policy involved herein upon the express warranty made by Moldenhauer that no insurer had ever cancelled any automobile insurance which had been issued to him. *The court also found that prior to the issuance of plaintiff's policy Moldenhauer had been insured with the State Farm Mutual Insurance Company, which company had, before plain-*

tiff issued its policy, notified Moldenhauer that it was cancelling his insurance, and he was informed that the State Farm policy was cancelled because of the number of small accidents in which he had been involved. Thus it clearly appears that Moldenhauer's declaration that no insurer had ever cancelled any automobile insurance which had been issued to him was false."

It is submitted that the trial Court's finding that there was no cancellation at the time appellee applied to appellant for insurance coverage is entirely contrary to the established legal authorities, the plain import of language without ambiguity and could only encourage immoral conduct on the part of applicants for insurance policies.

The trial Court was under the misapprehension that there had not been a cancellation of appellee's policy until December 27, 1952, which was the date that coverage ended. The Court overlooked entirely the fact that the letter of December 15, 1952, was unequivocal in its tenor, required no further act on the part of State Farm Mutual Insurance Company, and that no contingent event need occur. When that letter was written it was a definite cancellation and it scarcely requires that one must cite legal authorities to this effect. The trial Court should not impose a construction of ambiguity when it was most apparent to the appellee Erickson himself that he had been cancelled because he immediately sought to secure new insurance coverage.

The conduct of appellee in concealing the cancellation of his previous automobile insurance policy prior

to application to appellant must be considered in view of the pertinent sections of the California Insurance Code.

Section 330 reads as follows:

"Definition. Neglect to communicate that which a party knows, and ought to communicate, is concealment."

Section 331 reads as follows:

"Effect. Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

Section 338 reads as follows:

"Information Proving Falsity of Warranty. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

If the insurer was misled by statements made, it is immaterial whether the insured's omission to state the true facts was intentional or unintentional.

Mirich v. Underwriters at Lloyds of London, 64 Cal. App. 2d 522.

Section 440 reads as follows:

"Kinds of Warranties. A warranty is either express or implied."

Section 441 reads as follows:

"Express Warranty. A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof."

Section 443 reads as follows:

"Express Warranty to Be Embodied in Policy or Other Instrument. Every express warranty made at or before the execution of a policy shall be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it."

Section 444 reads as follows:

"Time of Warranty. A warranty may relate to the past, the present, the future, or to any or all of these."

Section 449 reads as follows:

"Breach Without Fraud. A breach of warranty without fraud merely exonerates an insurer from the time that it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk."

When a statement in an application for insurance is declared by the policy to be a warranty and the insured declares the statement to be true, falsity thereof voids the policy ab initio.

Craig v. U.S.F. & G. Company, 11 Cal. App. 2d 644;

Eddy v. National Union Indemnity Company (Ninth Circuit), 78 Fed. 2d 545;

Gilmore v. Eureka Casualty Company, 123 Cal. App. 20;

Emery v. Pacific Employers Insurance Company, 8 Cal. 2d 663 at page 669;

Allstate Insurance Company v. Miller, 96 Cal. App. 2d 778 at page 782.

See also excellent discussion in:

General Accident Life and Fire Insurance Company v. Industrial Accident Commission, 196 Cal. 179 at pages 187-188.

All of the available evidence has been adduced and is set forth in the transcript.

It would serve no purpose to return this cause for retrial because under the law it is inconceivable that the appellee could prevail and because the interpretation given by the trial Court of the letter of December 15, 1952, issued by State Farm Mutual Insurance Company as a "threat to cancel" rather than a present cancellation cannot be sustained.

This Court should reverse the judgment heretofore rendered and direct that judgment for the appellant be granted.

Dated, San Francisco, California,
May 2, 1955.

Respectfully submitted,

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